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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1719

WASHINGTON MEDICAL CENTER, INC., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY MEMORANDUM

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In its Brief, the United States admits (Brief in Opp., 4) that the Court of Claims' conclusion that original alleys were appropriations titled in the United States was based on the Building Regulations issued by President Washington on October 17, 1791, but insists that the decision does not conflict with prior decisions of this Court or other courts. A careful analysis of the cases will show that such a theory of title is completely at odds with prior decisions of this Court as well as others.

In *Pratt* v. *Law*, 13 U.S. (9 Cranch) 456, 490 (1815), this Court recognized that if original alleys were not "comprised under the denomination of streets," they were appurtenances to the abutting lots. The Court of Claims acknowledged that the alleys were not streets but refused to accept the necessary alternative. Contrary to the

United States' assessment of the holding of this Court in *Pratt*, *Pratt* did not involve the question of whether title to the soil of original alleys was acquired by the abutting lot owners. Rather, *Pratt* held that, in a sale between successors in title to original purchasers and a subsequent purchaser of lots, compensation could not be charged the subsequent purchaser for the soil of the alley since the alley easement had not merged with the fee. The critical point is that, unless the soil of the alley *was* owned by the abutting owner, the principle of merger could not have been an issue since there would be nothing to merge. As recognized by this Court (*Id.*), if the United States had held title to the soil (as in the case of streets or appropriations), a sale of the soil in the alley would be void whether the entire square or part of the square was involved. In other words, unless this Court in *Pratt* had determined that the original alleys were part of the residue clause with the underlying fee belonging to the abutting owners, the entire question of merger and compensation upon sale could not have been an issue. The *Pratt* Court did not in any way question that title to the soil of the alleys passed to *Pratt* or his predecessors, as the original purchasers from the Trustees.[1]

In its description of *Morris* v. *United States*, 174 U.S. 196, 254-58 (Brief in Opp., 5), the respondent completely misses the fact that this Court held that, as of March 2, 1797, the Dermott map indicated the "location and extent of public reservations or appropriations" designated by President Washington (*Id.* 257-58). The Building Regulations of President Washington were

[1] The view of *Pratt* now expressed by the United States is in absolute conflict with its earlier interpretations as set forth in the Taggart Opinion and Brief in *Fitzhugh* (Pet. 13) contained in the Record, and is directly contradictory to the status of original alleys as stated by the Commissioners in 1796. (Pet. 5).

promulgated six years earlier and, thus if, as the Court of Claims incorrectly found, the alleys were deemed appropriations, such appropriations would have been shown on the Dermott map or designated by the President in his letter of March 2, 1797. Moreover, the Building Regulations issued by President Washington have been held to be conditions annexed to the title to land conveyed in the grants by the Commissioners and to be "mere rules for the enforcement of existing rights. . . ." *Fowler* v. *Koehler*, 43 App. D.C. 349 (1915). Further, completely absent from the regulations is any language which requests the Trustees to convey alleys to the United States as in the letter of March 2, 1797 regarding streets and appropriations (*Morris*, *supra* at 253-54) or any language saying that alleys are "for the use of the United States." See *Van Ness* v. *City of Washington*, 29 U.S. 232, 284-85 (1830).

In footnote 4 (Brief in Opp., 5), the United States misconceives the significance of *Fitzhugh* v. *United States*, 40 F.2d 797 (D.C. Cir. 1930). In *Fitzhugh*, the court concluded that original alleys could not have been part of the second category under the Deeds of Trust "where lands were purchased directly for the use of the government." (*Id.* at 799).

Respondent attempts to justify the Court of Claims' decision by stating simply that the court "found that evidence [submitted by petitioners was] unpersuasive." (Brief in Opp., 4). Even assuming that petitioners' Motion for Summary Judgment should have been denied; summary judgment for the United States should not have been granted where there are disputed facts and no evidentiary support. Not only is the record devoid of evidence to support the court's conclusion that the alleys were appropriations purchased at the rate of 25 pounds per acre, (see, *Van Ness* v. *City of Washington*, *supra* at 263-64), but the decision ignored, without reference, authorities and documentation establishing that after the

alleys were created upon division the original purchasers bought the alley areas along with the abutting lots and that the only "sovereignty" exercised by the United States over the alleys was in the nature of police power regulations such as those promulgated by President Washington.

The authorities ignored by the court, which petitioners respectfully request this Court as the only Court with review jurisdiction to consider, were previously cited (Pet. 13) and are contained in the Record as part of the Addenda attached to the Memorandum of Points and Authorities in Support of Plaintiffs' Joint Motion for Summary Judgments as Addenda A-1—B-13. The most significant documentation submitted to the court both prior and subsequent to the court's decision is contained in the four large bound volumes submitted to this Court as part of the certified Record. One quick illustration will establish that, in purchasing lots, the original lot owners paid for and received the abutting alleys. See, for example, Exhibit G-8, which is page 185c from the "Sales of City Lots under the Direction of Commissioners of Public Buildings and Grounds of the City of Washington, District of Columbia, 1791-1802 (Vol. 6)" and which records the sales by number of lot and square, contents in square feet, day of sale, amount of sale and to whom. The square footage listed for the sale of Lot 2, Square 107 (2,844 square feet) is the *combined total square footage of the lot (2,685 square feet) and its proportionate abutting alley area (159½)* as listed and contained in the Register of Squares (Exhibit E-4) and the Disposal of Public Lots (F-3).[2] [3] The same and additional

[2] The Register of Squares and Disposal of Public Lot documents, which carefully allocate the amount of alley area for each lot to achieve the equal division required by the Deeds of Trust, were submitted to the court prior to its decision.

[3] In recording the sales, for amounts of ½ square foot or less, such areas were disregarded.

documentation was furnished to the court for all other alley areas involved.

The United States also supports the Court of Claims' refusal to consider relevant documentary evidence discovered both before and after it issued its decision granting Summary Judgment to the United States by relying on *Valmont Industries, Inc.* v. *Euresco, Inc.*, 446 F.2d 1193 (C.A. 10), *cert. den.*, 405 U.S. 922. However, in that case, there had been a full trial. Where complicated factual issues are involved, it is only fair that the ultimate decision rests on a consideration of all relevant evidence and the case should be reopened when a litigant in good faith presents newly discovered evidence which appears to be depositive of the questions. *Kennedy* v. *Siles Mason Co.*, 334 U.S. 249 (1948); *Smith* v. *United States*, 362 F.2d 366 (9th Cir. 1966). This should be especially so when a court decides a case on summary judgment and on a theory never presented or argued by either side.

The United States (Brief in Opp. at 6) sees no reason to defer consideration of this Petition pending a decision in other similar cases in the Superior Court for the District of Columbia and the United States District Court for the District of Columbia. Petitioners answer that such deferral is appropriate in light of the normal deference given decisions of state courts on issues which are primarily non-federal issues.[4] Further, the only other appropriate alternative would be to grant *certiorari* in this case to finally decide the title question and to eliminate the prejudicial effect of requiring petitioners in these proceedings to later seek other relief through a

[4] While geographically, the title issue is primarily a local matter, the issue has national historical significance as it relates to the founding of our Capital and has economic importance in the quieting of title and orderly development of the downtown area of the District of Columbia.

new action or other remedy in the event the courts of the District of Columbia come to a different conclusion.

Respectfully submitted,

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